FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS PROXMIRE AND SCHWARTZ

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BRIEF FOR RESPONDENTS PROXMIRE AND SCHWARTZ

QUESTIONS PRESENTED

1. Under the Speech or Debate Clause, may a United States Senator criticize public spending in Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?

2. Did the Court of Appeals err in finding that investigation and oversight by a United States Senator and his aide into the extent and justification of agency spending is not legitimate legislative activity, immune from question under the Speech or Debate Clause?

3. Does a publicly employed individual who voluntarily seeks and obtains large amounts of public funding for projects initiated and controlled by himself, and who invites public attention through publication of numerous articles, books, and press notices, become a "public figure" or "public official" for purposes of discussing public funding of his work?

4. Is a material issue of "actual malice" presented where the allegedly defamatory remarks are either expressions of opinion, or obviously colloquial language, reasonably descriptive of the factual situation described?

STATEMENT OF THE CASE

Senator Proxmire has directed his staff to examine questionable and wasteful federal government spending, principally in the areas where the Senator has official U.S. Senate committee responsibility (P. 28; A. 140-141).[1] When the research discloses expenditures, which in the Senator's opinion are wasteful, they may be the subject of floor comments, further investigation, public disclosure, proposal of limiting legislation, vote, or all of these measures (A.141).

[1] Citations to the Joint Appendix are designated by "A". References to the opinions of the lower courts will be to page numbers in the Petition for Certiorari, labelled as "P". Exhibits are listed either as "Pl. Ex." (Plaintiff's Exhibit) or "Def. Ex." (Defendants' Exhibit).

In March of 1975, Morton Schwartz, an experienced member of the Senator's staff, learned from NTIS (a weekly abstract of government studies and publications available to the public, prepared by the Department of Commerce) of two publications prepared under grants by the National Aeronautics and Space Administration ("NASA") by Dr. Ronald R. Hutchinson, Director of Research at Kalamazoo State Hospital (Michigan) (P. 29; A. 148-149). Schwartz obtained these studies from NASA which revealed that Hutchinson had other government contracts with the Office of Naval Research ("ONR"), the National Science Foundation ("NSF"), and the Michigan Department of Mental Health (P. 29; A. 149, 150).

In early April, 1975, Schwartz requested that the agencies provide materials and information on the listed contracts, any other contracts which Hutchinson had with these agencies, and the justification for support of the awards (P. 29; A. 149-150). Responses revealed other government contracts with the National Institute of Mental Health ("NIMH") and the National Institute of Drug Abuse ("NIDA"), for a total of eight different grants involving approximately $500,000 in federal funds. Inquiries were then made to those agencies for information on contracts with Dr. Hutchinson (A. 150-151).

After approximately forty hours of inquiry and study of the materials furnished by the agencies, Schwartz made a report to the Senator of what he deemed to be wasteful spending (P. 29-30; A. 142, 203-204, 216). The Senator agreed (P. 30; A. 142). Following an established policy of the Senator's office, Schwartz' findings and conclusions were prepared in the form of a report for use as both a speech and a

public announcement (A. 142). These were edited and approved by the Senator and, in accordance with standard practice, termed a "Golden Fleece Award" (P. 30; A. 142). All of the agencies (ONR, NASA, NSF, NIDA, and NIMH) contacted by Schwartz are within the jurisdiction of Senate Committees on which Senator Proxmire serves, with responsibility over agency budgets, appropriations, and expenditures (P. 28; A. 139-140).

The Senate speech and the press release are nearly identical in form except for the lead and concluding sentences in the press release (P. 31, 65-67; A. 80-83).[2] The speech was delivered on the floor of the Senate on April 18, 1975, and appears in the *Congressional Record* of the same date (A. 80). The speech in its factual content accurately identifies the contracting government agencies; the cost of the grants; the most recent annual expenditures; the individual agency grants by amount, subject, and year; findings from individual agency reports; the state and private institutions through which Hutchinson performed government contracts; and pending applications for additional grants (A. 80-83). To that factual base, Senator Proxmire added his opinion that the grants were wasteful, worthless, and an inappropriate expenditure of gov-

[2] The press release contains the entire text of the Senate speech, except for a remark by the Senator in the third from the last paragraph, where the Senator said: "It seems to me it is outrageous". The added lead and concluding sentences in the press release are respectively: "Senator William Proxmire (D.Wis.) announced on Friday"; and "Proxmire said that the public is urged to write him in Washington with suggestions for the 'Golden Fleece of the Month' for May." From the added remark in the *Congressional Record*, Proxmire concluded that he actually made the speech on the floor and added the "outrageous" comment. (P. 31, 65-67; A. 80-83, A. 220-21; Proxmire Depo. pp. 65-66, 70, 77-78).

ernment funds. The press release was sent to the Senate Service Department on April 15, 1975 for review and approval of its content in conformance with Senate Rules and then held for duplication and distribution in accordance with a previously listed schedule of newspapers and press media which routinely receive press releases issued by Senator Proxmire's office (P. 28, 30-31; A. 142-43). The release date of the press release was not until the morning of April 18, 1975, the same date as the Senate speech (P. 31; Def. Ex. 5).

On or about April 15, before issuance of the release, Schwartz contacted Hutchinson by telephone, told him of the planned Fleece Award to the funding agencies, and read him the text of the Proxmire statement (P. 31; A. 211-212, 245). Hutchinson objected generally to what he considered the unfair evaluation of his work, and advised that the listed application to the National Institute of Drug Abuse had in fact already been approved. (*Id.*) Hutchinson further noted the misspelling of his first name, which is "Ronald", not "Roland" and indicated that he would prepare a reply of his own (P. 31; A. 152, 212).

Hutchinson's response, entitled "Reply to Senator Proxmire's Statement of April 18, 1975" bore a release time one-half hour prior to that of Senator Proxmire's, but was actually distributed to the press and wire services the day before, on April 17 (A. 83, 194). Proxmire's office was then contacted by Associated Press seeking an explanation of what statement Hutchinson was responding to (A. 194-195).

In his release, Hutchinson emphasized the significance of his studies on measurement of animal aggression under different environment (A. 83-84). He ac-

knowledged that the work was done under federal grants of four agencies (A. 84). As in the phone conversation, Hutchinson did not challenge any of the factual statements in Proxmire's speech. His only reference to the speech was in the concluding paragraph (A. 84-85):

> Senator Proxmire berates and ridicules these agencies and their "bureaucrats" for the support of this research and the process by which the support was provided. He further evaluates the work as "transparent worthless" research. By disrupting the orderly process of governance, by belittling the reviews of the scientific funding agencies, and by public, uninformed, and inexpert discredit of work which is so socially necessary, he causes a disservice to his constituents and to the country.

Extracts of Hutchinson's release and the charge of Proxmire's "disservice to his constituents and to the country" appear in the first press coverage of the funding issue and were in the AP, UPI, Times Wire Service, and *Washington Post* stories published April 18 and 19, 1975 (A. 85-89, Pl. Exs. 32-39). Statements by the agencies defending the merit of the funding were also included in the original stories. No articles concerning the Fleece appear before these dates, or prior to the release time and day of Senator Proxmire's actual statement.

In his next report to his constituents by newsletter, Proxmire summarized his Fleece to NSF, NASA, and ONR for their funding of Hutchinson (P. 87-88). That report is essentially the same as the speech and press release, but in addition states that Hutchinson's tests and studies were not confined to monkeys, but had included a wide spectrum of the animal kingdom, including crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, and rats, as well as monkeys and humans (P. 87-88; See Pl. Ex. 70, A. 195).

In February 1976, in response to inquiries from constituents, Senator Proxmire issued a newsletter entitled "Did the Golden Fleece Get Results?" (A. 168). In that two-page letter Proxmire reviewed twelve of his monthly Fleeces, including ones to NSF, Selective Service, Army Corps of Engineers, the Congress, the Navy, the FAA, and the White House. Among this distinguished group the following five-line reference was made to the agencies' funding of Dr. Hutchinson (A. 168, 171):

> —The NSF, the Space Agency, and the Office of Naval Research won the "Golden Fleece" for spending jointly $500,000 to determine why monkeys clench their jaws.
>
> * * *
>
> All the studies on why monkeys clench their jaws were dropped. No more monkey business.

No mention was made of Hutchinson, his foundation, or the Kalamazoo State Hospital. No other references to his grants were made in the release. (*Id.*)

On November 24, 1975, Senator Proxmire appeared on the "Mike Douglas Show", a nationally televised program, and was asked about examples of his "Golden Fleece Awards". Senator Proxmire described three Fleece Awards (P. 70, n.3; Def. Ex. 6, pp. 2-5). The dialogue referring to government contracts with Dr. Hutchinson is (*id.*):

> Mike Douglas: You gave another award to a research project studying angry rats.

> Senator Proxmire: Well it was angry monkeys, rats and humans. It was a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking.
>
> Mike Douglas: You know we're laughing at this but this is really really.
>
> Senator Proxmire: Oh it's terrible.

No mention was made of Dr. Hutchinson, his foundation, the contracting agencies, the dates of performance, or the date of the Fleece Award. (*Id.*)

In the course of his deposition Proxmire was asked if he made any other television or radio appearances in which his discussed his Fleece to the agencies for funding the work of Dr. Hutchinson. Senator Proxmire could not recall any and had searched his appointments calendar to assist in any such identification and found none (Proxmire Depo. pp. 41-47, 50). He did state that taped interviews in his office or over the phone would not be included on his calendar. Other than the Mike Douglas Show, no texts of broadcasts are known, although an affidavit of Richard Shannon, producer of the "Bob Barry Show" carried in Milwaukee, Wisconsin, states that Senator Proxmire appeared on June 17, 1975, and "discussed Dr. Rolland [*sic*] R. Hutchinson and the grants he received from the National Science Foundation, the National Aeronautics and Space Administration, and Office of Naval Research, to study why rats, monkeys and humans clench their teeth" (A. 304).

After the speech and press release, but before the mailing of any newsletters or appearance on radio or television, Proxmire's office additionally learned that Hutchinson apparently had obtained a personal patent developed under government funding,[3] and that the State of Michigan had conducted an audit of Hutchinson's research department (A. 153). Schwartz made additional contacts with the agencies regarding Dr. Hutchinson's funding to: (1) ascertain additional information regarding the patents and whether the agencies, through their on-going review function, had learned of the audit (A. 153-154); (2) obtain information on the current status of Hutchinson's contracts (A. 156-157); (3) prepare questions for appropriation hearings of the agencies; and (4) prepare a report in response to constituent requests (A. 157-158). Senator Proxmire then utilized this information in questioning agency witnesses at hearings on NSF appropriations for fiscal year 1977 (A. 136-137, 143-144).

The state audit referred to had begun in the Spring of 1974, a year before Hutchinson's federal grants had come to the attention of Proxmire and his staff (Hutchinson Depo. p. 87). In December 1974, during discussion of the auditor's findings, Hutchinson was told that his position would be terminated in June of 1975 (A. 236), and in January 1975, the hospital advised the various federal agencies that it would not accept renewals of government contracts beyond the mid-1975 termination date (Def. Ex. 75).

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[3] The patent was for use of nicotine. A preliminary footnote to Hutchinson's paper on nicotine effect (Def. Ex. 71), shows that his work in this area was supported by ONR, NASA, NSF, the State of Michigan through two different institutions, and by Philip Morris.

The audit report was highly critical of Hutchinson's activities as research director, alleging failure to properly account for funds, misuse and misappropriation of funds and government equipment, and commingling of public funds with the funds of his private Foundation for Behavioral Research (A. 95-108).[4] A preliminary draft of the audit had been circulated to government officials the same day the Fleece was announced (Hutchinson Depo. pp. 99-100), and was released as a public document in early May (Def. Ex. 106). Press coverage was extensive and colorful, and linked Hutchinson's misuse of public funds to the loss of his position (A. 109-128). Although not alluded to by Senator Proxmire, the release of the audit and its news coverage preceded the Senator's constituent letters and interviews about funding of Hutchinson's studies.

From 1968 until his termination in mid-1975, except for one state project of no more than three months' duration, Hutchinson worked exclusively on federal agency-sponsored projects initiated and directed by himself. During that period he was a State of Michigan employee of the Department of Mental Health, first as Director of Research at Fort Custer State Home from 1968-1972, and then as Director of Research, Kalamazoo State Hospital. Both posts originally were established for Hutchinson, with the understanding that he would obtain federal research grants (Hutchinson Depo. pp. 10-11, 22-23, 26-28, 31-34). The research post

[4] This included having the Research Department transfer $3000 to the private Foundation (both headed by Hutchinson), which in return awarded the Research Department a $3000 grant to engage in a seminar/retreat in Nassau. State officials were then told only that expenses were being covered by a private foundation (A. 103-104).

was eliminated upon Hutchinson's departure in June of 1975 (A. 235-236).

During his seven years' tenure as Research Director, Hutchinson selected the projects, without ceiling or limitation, selected and supervised the personnel for the performance of the projects, and controlled and directed the use of research facilities and research funds (Hutchinson Depo. pp. 5-9, 18-23). Annual state budgets prepared by Hutchinson were submitted on the basis of federal contracts and grants, and state funds were approved to supplement the federal projects exclusively performed under Hutchinson (*id.* pp. 8, 14, 31). Throughout his tenure, all of the research monies were from federal and state funds (*id.* p. 135).

During that same period, federal grants under Hutchinson's control and supervision totalled $917,441 from five separate federal agencies (A. 312), with an estimated 50% or more of matching funds received from the State of Michigan (A. 96). Additional applications submitted to ten different federal agencies during that period, but for commitments beyond 1975, totalled $4,738,822, exclusive of state funds (A. 306-309). Hutchinson was not centrally controlled or supervised by any federal agency, but reported separately to each of the five agencies concerning their respective research grants. New grant proposals to each agency generally include no cost information on continuing grants with other agencies, or list other pending applications (Hutchinson Depo. pp. 283-286, 293-294). Apart from the information gathered by Senator Proxmire and reported in his speeches, there is no central federal accounting or total funding record of Hutchinson's federal support.

Following announcement by the state that it was terminating Hutchinson's position and would no longer accept funds in its name, Hutchinson solicited "renewals" of the existing agency contracts to be made to his own Foundation of Behavioral Research, the non-profit corporation he had founded in 1972 (Def. Exs. 76, 77). Later tax returns show that hundreds of thousands of dollars of equipment paid for by the government were transferred to Hutchinson's private foundation, and listed as assets of that foundation (Hutchinson Depo. pp. 148-149). Subsequent to the Fleece and the announced termination of his state position, his Foundation has received at least three renewals or additional government contracts (P. 30, n.2; A. 312).

Lower Court Opinions

The district court, ruling on Defendants' motion for summary judgment, held that all acts of investigation into the funding of Hutchinson's research were legitimate legislative activity privileged under the Speech or Debate Clause. It further held that the press release authorized by Proxmire, including the floor speech critical of the funding, was similarly privileged. With respect to the newsletter and news interviews, the court ruled that Hutchinson was a public figure and a public official, that the record could not support a finding of "actual malice", and that Defendants were therefore entitled to summary judgment on First Amendment grounds.

The court of appeals affirmed that the press release was absolutely immune under the Speech or Debate Clause, and found the privilege also applicable to comments contained in newsletters mailed to constituents. The court recognized immunity for acts of investigation prior to the date of the Senator's speech and press release, but declined to extend the immunity to acts of follow-up investigation and oversight. These acts, as well as the news interviews, the court found, were privileged under the First Amendment because Dr. Hutchinson was a public figure, and the record failed to establish actual malice.

SUMMARY OF ARGUMENT

(1) The right of representatives to communicate with their constituents and the public through publications authorized by Congress is mandated both by the historic purpose of the Speech or Debate Clause and by recognition of the role that "informing" plays in the legislative process. The growth of Congressional business has lessened the importance of actual speech on the floor, and use of the public forum to inform other Members or to muster constituent pressure is often an essential element in the development of legislation. *Doe* v. *McMillan,* 412 U.S. 306 (1973) provides immunity for such acts of informing about Congressional business where Congressionally authorized channels of communication are used.

(2) Senator Proxmire's investigation of federal agency funding of Petitioner's research was also legitimate legislative activity, absolutely immune under the Speech or Debate Clause. The investigation, both before and after the Senator's April 18, 1975 speech, sought information relevant to the Senator's ongoing responsibilities on Senate appropriations subcommittees, and was in an area on which legislation could be had.

(3) Dr. Hutchinson is both a public official and public figure. His position as Director of Research at a state hospital vested him with total responsibility for decisions involving millions of dollars of public funds and equipment, and gave him complete autonomy in selecting the work for which those resources would be used. His public position, therefore, involved sufficient individual responsibility so that the public had a legitimate interest in his personal qualifications and performance. Similarly, Dr. Hutchinson's voluntary involvement in soliciting substantial amounts of public funding to support his work, and his attempts to invite public attention to his work through publication of numerous articles and news releases, made him a "public figure" for purposes of discussing the merits of his research, and the justification for its support through public funding.

(4) Senator Proxmire's characterizations of the value of Petitioner's work were expressions of opinion whose truth cannot be judicially determined. The record cannot support a finding of actual malice regarding any of the factual statements made by Respondents, because their investigation prior to release of the statements had been thorough, and produced reasonable evidentiary support justifying each of the statements made.

ARGUMENT

I. Defendants' Acts of Investigating and of Informing Through Newsletter and Press Release Are Legitimate Legislative Activity Absolutely Immune Under the Speech or Debate Clause.

The Seventh Circuit Court of Appeals found that Senator Proxmire's preliminary investigation of agency spending, and the reporting of his conclusions contained in the Senate speech by newsletter and press

release, constituted legitimate legislative activity entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution. Follow-up investigation with agency officials, the Court concluded, was not similarly protected. While a review of the Clause's historical purpose and an analysis of Congress' function and manner of operation indicates that all of these actions are legitimate legislative activity, Petitioner has argued that the *dicta* of past cases—principally dealing with alleged criminal offenses—require that Senator Proxmire's investigation and open criticism of public spending be reviewed.

Members of Congress enjoy an absolute privilege against liability for their legitimate legislative activity. This is guaranteed by the Speech or Debate Clause, Art. I. Sec. 6, which provides:

> The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place.

In its earliest interpretation of the Speech or Debate Clause, this Court recognized the broad application of the privilege beyond words spoken in debate, and found it to apply "to things generally done in a session of the House by one of its members in relation to the business before it", *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881). Subsequent cases have maintained a broad construction of the privilege to protect activity of legislative defendants or their aides "acting in the sphere of legitimate legislative activity", *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951); *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975). Once found to apply, the immunity is absolute and protects legislators "not only from the consequences of litigation's

results but also from the burden of defending themselves", *Dombrowski* v. *Eastland,* 387 U.S. 82, 84-85 (1967).

Whether any particular action is essential to legislating must be determined in view of the historical purpose of the Clause, ". . . interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . .", *United States* v. *Brewster,* 408 U.S. 501, 508 (1972). This makes a consideration of the proper functions of Congress in our system of representative government, and a practical evaluation of the means necessary to fulfill those functions, indispensable. Without such review, the perception of Congress may become constricted by ideas suiting a less complex society, and a greater portion of the ordering of public affairs will be assumed by the executive and the courts.[5]

The actions of Senator Proxmire and his staff in investigating and informing Congress and the public of what he believed to be waste and inefficiency in government were within the historical contours of the Clause, and were as well an essential part of the legislative function. That history and function, as well as this

[5] This conclusion was repeated by Senator Metcalf during the 1973 hearings on the Constitutional immunity of Members of Congress:

> As one and one are two, then, the narrower the definition of legislative acts is:
>
> The broader is the jurisdiction of the Court;
>
> The more intimidating is the will of the executive;
>
> The more constricted is the independence of the legislator; and
>
> The less representative is the Congress of its constituency.

The Legislative Role of Congress in Gathering and Disclosing Information, Hearings Before the Joint Committee on Congressional Operations, 93rd Cong. 1st Sess. 2-3 (1973).

Court's pertinent interpretations of the Speech or Debate Clause, are reviewed below.

A. Senator Proxmire's acts of informing through newsletter and press release were legitimate legislative activity.

1. HISTORICAL PURPOSE OF SPEECH OR DEBATE IMMUNITY

Earlier Supreme Court cases have traced the English origin of the Speech or Debate Clause, noting the absence of illuminating debate concerning its adoption by the Constitutional Convention. Because the language of the Speech or Debate Clause is drawn almost directly from the English Bill of Rights of 1689, developed as a result of the long struggle between Parliament and the Crown, consideration of that struggle is instructive of what the American framers sought to achieve.[6]

Ironically, defense of the right of Parliamentary Members to criticize spending by the Crown itself played a substantial role in development of the privilege. The earliest historical assertion of Parliament's independence occurred in 1399 in *Haxey's Case,* where

[6] Only highlights of that history especially pertinent to the present case will be presented here, as detailed historical analyses are readily available. *See generally,* Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers,* 86 HARV. L. REV. 1113, 1120-1144 (1973) (hereinafter cited as "Legislative Privilege"); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts,* 2 SUFF. L. REV. 1, 3-16, (1968) cited with favor in *Powell* v. *McCormack,* 395 U.S. 486, 502 n. 20 (1969). Historical treatment is also contained in a number of Supreme Court Speech or Debate cases. *Kilbourn* v. *Thompson,* 103 U.S. 202-204 (1881); *Tenney* v. *Brandhove,* 341 U.S. 367, 372-374 (1951); *United States* v. *Johnson,* 383 U.S. 169, 177-180 (1966); *Gravel* v. *United States,* 408 U.S. 606, 624, 658 (1972). *See also, Coffin* v. *Coffin,* 4 Mass. 1 (1808).

Haxey was convicted for sending a bill from the House of Commons to the House of Lords critical of excessive expenditures in maintaining the royal household.[7] This same conduct was later protected by Strode's Act, passed in 1512, which declared Strode immune from punishment "for any bill, speaking, reasoning or declaring of any matter or matters concerning the Parliament . . .".[8]

In 1629, Sir John Eliot criticized the Crown's expenditures, this time used in war with France, and was convicted of sedition. Following civil war and the dethroning of Charles I, a new Parliament in 1668 declared Eliot's conviction an illegal judgment, and "against the freedom and privilege of Parliament".[9]

While challenges to the right of Parliament to criticize expenditures played a part in creating the Parliamentary privilege, it was the prosecution of a Member for republication of documents outside the House of Commons that led directly to the provision contained in the English Bill of Rights. Sir William Williams, the Speaker of the House of Commons, had republished the "Dangerfield narrative", with House approval, concerning the alleged "popish plot" to restore Catholicism as the established religion of England.[10]

The debate authorizing such publication emphasized the function of Parliament in informing the people:

[7] Oppenheim, *Congressional Free Speech,* 8 LOYOLA L. REV. 1, 7-8 (1956).

[8] 4 Hen. 8 c. 8, as reproduced in TANNER, TUDOR CONSTITUTIONAL DOCUMENTS, 558-559 (2d Ed. 1930).

[9] 6 W. HOLDSWORTH, *A History of English Law* (1927). *See, United States* v. *Johnson,* 383 U.S. 169, 181-183 (1966).

[10] *Legislative Privilege,* 1128-1131.

> Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt but it will do so to those who are the enemies of our religion and liberties.
>
> * * *
>
> The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions.[11]

Four years after the publication, following the succession of James II to the throne, Williams was prosecuted and convicted for republication of the narrative. Williams' defense that publication would encourage inquiry and was thus privileged as part of the Parliamentary function of counseling and inquiring was rejected by judges specially appointed by James II. Shortly thereafter, James was exiled, and a committee appointed by the House of Commons, including Williams, drafted what became the English Bill of Rights.[12] The committee reported that the speech or debate guarantee was inserted in the Bill for the sake of Sir William "who was punished out of Parliament for what he had done in Parliament".[13] The English Bill of Rights provided:

> That the Freedom of Speech and Debates on Proceedings in Parliament ought not to be impeached

[11] 13 How. St. Tr. 1370 (1684-1695). J. TORBUCK, A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND, 92, 96 (1741).

[12] 10 H.C. Jour. 15 (Jan. 29, 1689).

[13] 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1973).

or questioned in any Court or Place out of Parliament.[14]

The Speech or Debate Clause contained in Article I, Section 6 of the United States Constitution was drawn directly from the English Bill of Rights,[15] and was unanimously adopted with little or no debate. Although little guidance is provided by the Constitutional Convention, there is a rich history of comment on the clause by the Constitutional framers and other statesmen including Jefferson, Madison and James Wilson.[16]

Wilson, one of the Constitutional delegates responsible for framing the provision, stressed that the duty of a representative made it "indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone. . . ." [17] Protection for the public speech of

[14] 1 W. & M. Sess. 2, c. 2 (1689).

[15] It also appeared in Article V of the Articles of Confederation as: "Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress . . ."

[16] The importance of English precedent after adoption of the privilege in the U.S. Constitution becomes less important, and more subject to dispute. *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K.B. 1839) held a *publisher* liable for republication of Parliament debate, while *Wason* v. *Walter*, L.R. 4 Q.B. 73 (1868) held republication to be privileged. The correct interpretation of the two holdings is sharply contested in *Gravel* v. *United States*, 408 U.S. 606 (1972). In any event, it seems evident that the English tradition of not republishing legislative proceedings existing at the time of *Stockdale* was dramatically altered by the American concept of open assembly embodied in Article I, Section 5, *requiring* that each body keep a Journal of its proceedings.

[17] 1 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967). Cited with favor in *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951); *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969).

representatives was necessary, because the nature of representative government mandated communication between the people and those to whom they had committed the exercise of power.[18] As Wilson said:

> That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former.[19]

Similar sentiments were voiced by Madison, who emphasized that our system of representative government operates effectively only when the people are fully knowledgeable about their government. This requires that Congressmen "look diligently into every affair of government and talk much about what [they] see."[20] Madison saw the exchange of information about government as the heart of our Constitutional system:

> Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.
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> * * * *

[18] 2 ELLIOTTS DEBATES 424 (1788).

[19] 1 WORKS OF JAMES WILSON 422 (McCloskey ed. 1967).

[20] 4 PAPERS OF JAMES MADISON 236, 237 (Hutchinson ed. 1965).

> . . . the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right.[21]

The clearest exposition of the privilege and its place in the Constitutional scheme of government came in 1797 when a federal grand jury sought to investigate the conduct of several members of Congress from Virginia, including Congressman Cabell, for *sending newsletters to constituents* critical of the administration's policy concerning war in France. Thomas Jefferson, then Vice-President, joined by Madison, prepared and filed a protest to the Virginia House of Delegates which resulted in the dropping of the grand jury inquiry. That protest, because of its eloquence, its authorship, and its complete identity with the issue now before this Court, is quoted at length:

> [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance of coercion of the coordinate branches, Judiciary and Executive; *and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any:* that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could

[21] 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

> go home to their several counties and confer with their constituents.
>
> * * *
>
> [F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views.[22]

In the fullest and most nearly contemporaneous explanation of Congressional privilege, Jefferson and Madison emphatically expounded its application to communications between representatives and their constituents in the very form used by Senator Proxmire here. The manner in which the Congress operates in a representative democracy, more fully discussed in the next section, was recognized as requiring a free flow of information *in order to assure Congressional independence.* There is no room for equivocation—unless the principles of Jefferson's and Madison's petition

[22] 8 WORKS OF THOMAS JEFFERSON 322-327 (Ford ed. 1904) (Emphasis added).

are squarely rejected by this Court, there can be no trial of Senator Proxmire or his staff based on the communications with his constituents here.

2. The Role of Informing in the Legislative Process

Analysis of the intent of the framers makes apparent that Article I, Section 8, enumerating Congressional powers, is not a complete description of the Congressional function. The concept of representative government meant that not only would the people be governed, but they would be governed by their consent and that such consent would be based on a full awareness of the government's activities. Creating that awareness would in large part be the function of the legislature. Thus, the legislature has an informing function which is entirely distinct from the business of adopting legislation.[23]

The independent importance of the informing function, however, has tended to obscure recognition that, as the work of Congress has evolved, informing has also become an essential ingredient to the development of legislation. As shown below, to strip the informing

[23] The independent function was notably explained by Woodrow Wilson:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. . . . unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

W. Wilson, Congressional Government 303 (1885). *See also*, Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 205-206 (1926).

process of legislative privilege would dramatically intrude into the manner in which Congress considers and establishes legislation.

Under traditional Parliamentary practice at the time of the Constitution, speech and debate in the legislative chambers were of central importance in determining whether, and in what form, legislation should pass.[24] But with the growth of Congressional business, the importance of floor debate has declined, until now observers agree that the process of legislative development takes place largely outside the House and Senate chambers.[25]

The role once played by debate in chambers has in large part been taken over by committees.[26] Legislative proposals are referred to the Congressional committee having jurisdiction over that type of legislation, which then considers the proposals and decides whether to recommend that the legislation proceed to the floor for approval or rejection by the general membership. Proposed legislation thus receives a detailed review only by the few Members whose committee assignments commit them to specialization in that area.

With less attention paid to daily floor proceedings, foreclosing Congressional debate in the public arena

[24] See Jefferson's Manual of Parliamentary Practice Sec. XXXI (Brown ed. 1977).

[25] *See, e.g.*, Burger, *How Can We Cope? The Constitution After Two Hundred Years*, 65 A.B.A. Journal 203, 204 (1979); *The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Ass'n.*, 13-14 (1945) ("APSA Report").

[26] E. S. Griffith, *Congress: Its Contemporary Role* 74-76 (3rd ed. 1961).

prevents those Members without committee influence from making their voices heard. Where once each Member would have an equal opportunity to put forth the force of his views, committee practice without the possibility of open, public discussion would concentrate Congressional powers over legislation and public opinion in the hands of a few.

But use of the public forum is not only needed by those Members lacking committee input; such use is often a practical necessity in order for a single Member to contact and inform the broad Congressional membership. The relative inefficiency of internal circulation of lengthy printed materials was explained by Senator Proxmire in his deposition (A. 220):

> I have found in 19 years in the Senate that very often a statement on the floor of the Senate or something that appears in the Congressional Record misses the attention of most members of the Senate, and virtually all members of the House because they don't read the Congressional Record. If they are handed a news release, or something, that is going to call it to their attention . . .[27]

Thus, the work of Congress has moved from debate on the floor in two complementary directions. Detailed consideration of legislation has moved into committee, while actual discussion involving the membership at large has taken place more and more in the public forum. Each part of the process is essential to support the other.

[27] The Senator's point that public discussion is often essential to inform other legislators has also been made by this Court: "Without the information provided by the press . . . many of our representatives would be unable to vote intelligently . . ." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975).

This is not idle reasoning; Congressional commitment to open debate as a necessary predicate of Congressional action is made explicit by the creation of a vast statutory network authorizing Congress as a whole, committees, and individual members, to communicate with and inform the public and each other about Congressional business. The *Congressional Record,* established by Congress as "substantially a verbatim report of proceedings," 44 U.S.C. § 901, is printed and issued daily, 44 U.S.C. § 903.[28] The Public Printer is required to distribute copies in various multiples to, among others, the entire legislative membership, offices of the Executive branch, the entire federal judiciary, the libraries of virtually all government offices, state government offices, foreign legations, and each newspaper correspondent listed in the Congressional Directory, 44 U.S.C. § 906.[29] Further, the Public Printer under the direction of the Joint Committee on Printing must make the Congressional Record available for sale to the general public by subscription or individual copy, 44 U.S.C. § 910.

But even the *Congressional Record* is only a small part of the broad informing mechanism established by

[28] The *Congressional Record* was previously called "The Congressional Globe". Its evolutionary development progresses from its earliest form, notes or minutes (e.g. 8 CONG. GLOBE, 26th Cong. 1st Sess. 507 (1840)), to a hybrid form of minutes and verbatim reports (e.g. 20 CONG. GLOBE, 31st Cong., 2d Sess. 432 (1851)), to essentially its present verbatim form (e.g. 27 CONG. GLOBE, 34th Cong., 3d Sess. 274 (1857)).

[29] The Public Printer is a Presidential appointee, whose office and duties are defined by statute, 44 U.S.C. §§ 301 *et seq.* In the distribution and sale of public documents, including the *Congressional Record,* the Public Printer is assisted by the Superintendent of Documents, 44 U.S.C. § 1702.

Congress to assist in its business. Committee reports, hearing records, investigative reports, reprints of speeches or addresses—all are widely disseminated to foster public awareness and discussion of legislative developments.[30]

Still another method of information dissemination is provision for media access to Congressional proceedings. This includes the establishment of media galleries and distribution of releases under Congressional supervision.[31] More recently, the intermediary of press interpretation has been supplemented by direct gavel-to-gavel coverage of some Congressional proceedings.[32]

[30] The Government Printing Office ("GPO"), which handles Congressional publications has an estimated budget of almost $74 million for Congressional binding and printing in 1979. Legislative Branch Appropriations, FY 1979, Part 2, *Hearings Before the Senate Comm. on Appropriations, Subcomm. on the Legislative Branch*, 95th Cong., 2d Sess. 401 (1978) ("Legislative Branch Appropriations, FY 1979"). The *Congressional Record* alone is printed in more than 36,000 copies each day that Congress is in session.

[31] News releases are distributed through the facilities of the news media galleries in both the Senate and the House. The Senate media galleries, which are provided and staffed by the Senate, 2 U.S.C. §§ 61f, 61f-1, provide facilities for accredited correspondents to cover all activities of Congress. See JOINT COMM. ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 79 (1975). The management of galleries has been held immune under the Speech or Debate Clause, *Consumers Union of the United States, Inc.* v. *Periodical Correspondents Ass'n.*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. den.* 423 U.S. 1051 (1976).

[32] Television broadcast of House proceedings was authorized in 1977, and began in January 1979. See H.R. Res. 866, 95th Cong., 1st Sess. (1977). Coverage of committee hearings to enlighten the public on "the operations, procedures, and practices of the House as a legislative and representative body . . ." were previously authorized by House rule, JEFFERSON'S MANUAL AND RULES OF THE

Finally, Congress has from its inception authorized its members to communicate with their constituents by free use of the mails.[33] In 1973 legislation, Congress redefined the purpose and scope of the franking privilege, emphasizing that a primary purpose of the frank is "[to convey] information to the public and . . . [to request] the views of the public" on matters which "directly or indirectly pertain to the legislative process or to any Congressional functions. . ." 39 U.S.C. § 3210 (a)(2).

The statutory scheme addresses both the type of publications that may be sent under a frank, and the content that may properly be included. Newsletters and press releases are specifically included as proper uses, § 3210(a)(3)(B), but matter which is purely personal or unrelated to official business is prohibited or unrelated to official business is prohibited, § 3210 (a)(4). Mass mailings under the frank must be approved for compliance with rules on format and con-

HOUSE OF REPRESENTATIVES H.R. DOC. 663, 94TH CONG. 2D SESS. § 720 (1977). While the Senate has not yet established continuous coverage, it does directly broadcast proceedings felt to be of particular importance. *E.g.*, the broadcast of debate on the Panama Canal treaties. See New York Times, Jan. 29, 1978, at 19, Col. 1.

[33] The Congressional frank dates back to an act of the Continental Congress in 1775. In 1789, the First Congress reaffirmed the existence of mailing privileges for members of Congress. See *Communication With Constituents: The Senator's Duty to Inform the People, Report of the Senate Ad Hoc Committee on Legislative Immunity*, 95th Cong. 1st Sess. 11-13 (1977). Besides providing the frank, Congress also facilitates communication between members of Congress and their constituents by providing allowances for telephone and telegraph, stationery allotments, and at-cost reprints of extracts of the *Congressional Record*. See JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 73 (1975); 44 U.S.C. § 907.

tent.[34] Members are specifically authorized to send either the *Congressional Record,* or excerpted speeches or reports contained in it, under the frank, 39 U.S.C. § 3212. Misuse of the frank falls within the jurisdiction of committees of both houses, 2 U.S.C. §§ 501, 502, which discipline Members for infractions of the detailed procedures governing the frank's proper use.[35]

The dissemination of information, and eliciting of public response through these mechanisms creates an interaction that is an indispensable ingredient of Congressional operations. Members are informed by their fellow Members, the press, and the public, and are, as well, stirred into action by the awareness of public participation. Examples are legion demonstrating the often-crucial connection between informing and the development of legislation.[36]

A spectacular example of the use of the informing function to influence Senatorial action occurred in connection with Senate ratification of the Panama Canal treaties in 1978. Senators favoring ratification,

[34] See Senate Comm. on Rules and Admin., Standing Rules of the United States Senate, Rule XLVIII (1977).

[35] The frank is to be used for official Senate business, and may not be used for the mailing of political matter. Regulations govern the inclusion of pictures of the Senator, and also the size type in which the Senator's name appears. There are restrictions on use of the frank to send personal greetings. Mass mailings under the frank may not be made within a certain period prior to a primary or general election. JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 193-218 (1975).

[36] In addition to those mentioned here, *Legislative Privilege,* 86 HARV. L. REV. 1113, 1151-1152 (1973) lists several examples where Congressional publicity has led to public pressure resulting in important legislation.

as well as those opposed, sought to generate national support for their own points of view with the objective of creating enough constituent pressure to swing the votes of undecided or wavering Senators.[37] "Speech or debate" was pursued with equal fervor both inside and outside the halls of Congress. To distinguish between privileged and unprivileged statements based on their geographical location would be to erect a distinction of the utmost artificiality. The debate before constituents was at least as vital to Senate consideration of ratification as were the more traditional proceedings on the Senate floor.

Another case when Congressional action was inextricably tied to Member-fomented public discussion was the legislation correcting abuses in the drug industry. Senator Estes Kefauver, who over several years in the late fifties and early sixties directed steady publicity towards the failings of government control and industry responsibility in that area, eventually succeeded, with the assistance of press coverage and public reaction, in achieving passage of drug legislation.[38]

Not surprisingly, examples of use of the informing function to influence legislation may also be found involving Senator Proxmire. In 1975, Proxmire used a

[37] See New York Times, Jan. 20, 1978, at 3, Col. 3. A group including Senators and other prominent conservatives formed a "Panama Canal Truth Squad" which conducted a speaking tour in several states where the Senators representing the state were thought to be vulnerable to constituent pressure. Senators received record amounts of constituent mail in connection with ratification proceedings. See New York Times, Feb. 21, 1978, at 31, Col. 1.

[38] J. B. GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY 352-360 (1971).

press release to call public and Congressional attention to a government-sponsored study of the effects of marijuana on sexual response. The considerable public response generated was the subject of extensive comment at later appropriations hearings of the agencies involved,[39] and the Congress responded by including a provision in the Appropriations Act terminating funds for any further such studies.[40]

These examples show the close relationship between specific "informing" acts of a particular Senator or group of Senators and the development of a legislative response. The interaction between a Senator and his constituency, whether that constituency is local or national, which leads in this way to the development of legislation, is an essential part of the legislative process, and should be decisively placed within the sphere of legitimate legislative activity.

3. Supreme Court Precedent

Because maintenance of legislative independence requires something more than the isolated safeguarding of discussion and voting within the actual halls of Congress, this Court has recognized the need of Congressional representatives to remain linked by the bonds of discourse to those they represent.[41] In *Watkins* v. *United States,* 354 U.S. 178 (1957), the Court affirmed the role of Congress as watchdog of the people and contrasted improper attempts to "expose for the

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[39] See 122 Cong. Rec. H-3299 (daily ed. April 13, 1976); 122 Cong. Rec. S-7055 (daily ed. May 12, 1976).

[40] P.L. 94-303, § 404, 90 Stat. 597 (1976).

[41] *Tenney* v. *Brandhove,* 341 U.S. 367, 376 n. 6 (1951).

sake of exposure" with this historically legitimate power of the Congress "to inquire into and *publicize* corruption, maladministration or inefficiencies in agencies of the Government," *id.* at 200 n.33 (emphasis added). Chief Justice Warren, quoting the words of Woodrow Wilson, wrote for the majority that (*id.*):

> "The informing function of Congress should be preferred even to its legislative function." [citation omitted] From the earliest times in its history, the Congress has assiduously performed an "informing function" of this nature.

Since *Watkins,* the Court has nevertheless engendered confusion concerning the *means* which may be utilized in fulfillment of this task, by the sometimes unnecessarily broad generalizations and conflicting opinions in *United States* v. *Brewster,* 408 U.S. 501 (1972), *Gravel* v. *United States,* 408 U.S. 606 (1972), and *Doe* v. *McMillan,* 412 U.S. 306 (1973). While the clarification offered by the last of these decisions necessarily delineates the law applicable to the present case, Petitioner's uncritical reliance on *dicta* offered in *Brewster* requires closer analysis of the holdings of those cases and their mutual consistency.

United States v. *Brewster* held only that the unlawful taking of a bribe by a Member of Congress, even if incipient to an alleged legislative act, is itself no part of the legislative process and may be prosecuted consistent with the Speech or Debate Clause. During the course of the Court's discussion on legislative activity, however, Mr. Chief Justice Burger suggested that "the realities of the American political system" have led to performance of a number of legitimate political, but non-legislative, errands such as "so-called 'news letters' to con-

stituents, news releases, and speeches delivered outside the Congress", whose performance has never seriously been suggested to fall within Speech or Debate Clause protection.[42]

At the same time, the Court in *Gravel* v. *United States* focused on a very special exercise of the informing function, namely, arranging for private republication of classified documents introduced in a Congressional committee, in contravention of criminal statutes prohibiting public transmitting of such information.[43] The Court in *Gravel* stressed that the *illegal* nature of the action outside of Congress was of great importance to the immunity issue, noting the "decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct . . .",[44] and ruling (*id.* at 626):

> While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause.

[42] 408 U.S. at 512. The danger of offering advisory language unaided by the focus of the case or controversy at issue is nowhere so clearly demonstrated. In fact, it had never seriously been contended that such matters as newsletters and releases were *not* within the protections of Congressional immunity, and spokesmen such as Jefferson and Madison had made this emphatically clear, not long after adoption of the Constitution. *See* pp. 22-23, *supra.*

[43] 18 U.S.C. § 793; *See Gravel* v. *United States,* 408 U.S. at 608.

[44] 408 U.S. at 620.

Republication in violation of Congressional mandate wa specifically contrasted with publication authorized by Congress, on which no opinion was expressed.[45] Thus, *Gravel* indicates that Congress' ordering of its informing activities, although not decisive of the scope of Congressional privilege, may nevertheless be extremely pertinent to this Court's determination of whether any particular republication is within the legitimate needs of Congress.

Explicit recognition that republication of Congressional materials outside of Congress is protected by Speech or Debate immunity when fulfilling the legitimate need of Congress comes in *Doe* v. *McMillan, supra.* The extent of Congressional needs, and the degree to which informing the public is considered necessary to meet them, however, is easily lost within the shifting areas of agreement in the decision's five separate opinions.

Justices White and Powell "[did] not doubt the importance of informing the public about the business of Congress," 412 U.S. at 314, but adhered to the suggestion in *Gravel* that this could often be done by internal distribution of information within Congress, with the information then, passively, being available for inspection by the press and the public.[46] Accordingly, they

[45] 408 U.S. at 626, n.16. This leaves a third possibility unaddressed by *Gravel*; *i.e.*, republication that is neither prohibited, nor authorized, by Congress.

[46] 408 U.S. at 317. This response to the public need for information about the workings of government has a strong Alice-in-Wonderland quality to it. Once the need is recognized, there is little reason to immunize only the most inefficient methods of meeting it. Surely those unable to physically go to Congress, or unwilling to repose more trust in the press than in their elected representatives, equally deserve to be informed about their government's activities.

were unwilling to hold that external publication ". . ." simply because authorized by Congress, must *always* be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings,' " *id.* (emphasis added), and left for the lower courts to determine, on a case by case basis, whether a particular public distribution was "beyond the apparent needs of the 'due functioning of the [legislative] process.' " *id.* at 317.

Justices Douglas, Brennan, and Marshall—although joining in the majority opinion—flatly reject its treatment of the "informing function" and continue stressing the immunity for informing they had previously urged in dissents (*id.* at 328):

> A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating.

Doe, however, presented an unusual case because the material published (names and embarrassing details of particular high school students) was "totally irrelevant" to the Congressional study and unconstitutionally infringed on the right of privacy by falling into that category of discourse which *Watkins* had labelled "exposure for the sake of exposure". Commitment to the legitimacy of the informing function was not abandoned, but the information published would have to

have some relevance to the public understanding of Congressional business.

Equal in defense of the informing function's legislative nature is the concurring and dissenting opinion of Justice Blackmun, of especial importance because it is joined by the Chief Justice, author of the *dicta* in *United States* v. *Brewster.* Relying on the same writings and precedents as the Douglas concurrence, Justice Blackmun concludes (*id.* at 334):

> . . . that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation" as is the gathering of information or writing and voting for the publication of the report.

Although the only point reached is distribution of authorized committee reports, the sweep of the language justifying this public distribution applies no less to Congressional publications of even a single Member. In addition to advising other Members, the legitimate ends served by publishing the committee report are listed as those (*id.* at 332):

> (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress.

Each element applies with equal force to publication of press releases or newsletters by an individual Mem-

ber. Despite the unquestionable importance of committees to the present-day legislative process, the committee is not the root of the representative system, and has no monopoly on the need or the ability to inform and receive comments from the public. It is ultimately, the representative to whom these duties fall, and there is no distinction of Constitutional magnitude which would confer Speech or Debate immunity on acts of Congressional informing through committees while leaving individual, possibly "maverick" legislators isolated from their constituents. The extension of immunity to an individual Member's publication about Congressional business through the facilities of Congress is supported both by the historical precedent upon which Mr. Justice Blackmun relies, and practical evaluation of the manner in which Congressional operations have evolved.

The concurring and dissenting opinion of Justice Rehnquist, joined by Justices Blackmun and Stewart, and Chief Justice Burger, would have held the public distribution of reports authorized by Congress immune under the Speech or Debate Clause, and deplored the majority making materials bearing on the legislative process less available than they might be.[47] Again, these Justices rejected the distinction intimated between internal and public distribution of Congressional documents, especially where the limitation on public distribution was contrary to the intent of Congress.

When the several opinions in *Doe* v. *McMillan* are read together, as they must be in order to maintain a majority beyond its narrow facts, a majority of the Court is found in agreement that informing the public

[47] 412 U.S. at 341.

of relevant Congressional business through authorized publications is a legitimate legislative function, immune from inquiry under the Speech or Debate Clause.[48] This position is wholly consistent with the Court's holding in *Gravel* v. *United States,* which dealt, quite distinctly, with publications specifically prohibited and made unlawful by Congress. Applied to the present case, this synthesis of *Doe* and *Gravel* requires immunity for Senator Proxmire's discussion of public spending in newsletter and press release. Both were publications informing the public about problems and issues of Congressional business whose distribution was authorized by Congress.[49]

If, instead of the focus on Congressional authorization or prohibition, the nature of the public distribution here is measured against the "legitimate needs" of

[48] A distinction might be conceived between publications whose distribution is particularly authorized, such as the committee report in *Doe,* and publications whose distribution is routinely authorized, such as the daily Congressional Record, or newsletters and releases under a frank. But again, if Congress has expressed its intent that the public be informed through certain methods, and has developed statutory and self-disciplinary schemes to that end, attempts to meet the acknowledged need to inform the public in the manner authorized should not be stripped of protection simply because Congress elected not to authorize such publications item by item. The expressed intent of Congress is clear in either case, and the ability to inform the public equally strong.

[49] Although the radio and television appearances may equally serve to inform the public on important issues, the connection to Congress' commitment to the informing function is less direct, as the Congressionally authorized channels of communication with the accompanying procedural safeguards are not utilized. Respondents would urge rejection of any *per se* lack of immunity principle in reference to these private, lawful publications, but have not raised this issue in view of the protection afforded these publications under the First Amendment. See pp. 49 *et seq, infra.*

the legislative function, the same result is reached.[50] As the court of appeals noted below, the newsletter to constituents and release to the Senator's media list on file with the Senate Service Department functioned simply to call attention to the Senator's statement critical of public funding. The nature of the information contained in the publications, criticism of public appropriations and the use of public funds, is peculiarly an area of great interaction between representatives and the public where broad public discourse from a variety of perspectives is required.[51] In such areas of public concern, statements made in the public forum to inform the electorate and invite response to other elected representatives are an essential component of Congressional debate.

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[50] This approach, set out by Mr. Justice White in the *Doe* v. *McMillan* "majority" opinion, has been followed by the District of Columbia Circuit on remand in *Doe* v. *McMillan*, 566 F.2d 713 (D.C. Cir. 1977), *cert. den.* 46 U.S.L.W. 3649 (1978), and by the Seventh Circuit here. In *Doe*, the limited distribution involved was held to be within the legitimate needs of Congress. The District of Columbia Circuit broadly defined the "need" of Congress to publicly distribute informing materials, noting that such information was necessary to make the "right to petition" meaningful, (*id.* at 718):

> Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable. Had not the subject report been available to the public, appellants might not have learned of its contents. This is an illustration of the need to make such reports generally available to the public.

[51] The importance of public participation in the public appropriations process is highlighted by such recent developments as the adoption of "Proposition 13" in California, where a public dissatisfied with the spending policies of the legislature moved directly to curtail legislative discretion in this area. New York Times, June 7, 1978, at 1, Col. 4.

The extraordinary public debates and involvement with major Congressional decisions demonstrate that use of the public forum has been necessary to offset the happenstance of committee assignments and the political power of individual Members.[52] To curtail such discussion would radically alter the reality of how Congress processes legislation. Without doubt, the more the public becomes involved, the more "political" is the process. But it must be realized that the consideration and passage of legislation is itself political. To the extent that the principle of representative government requires public participation, restricting a representative's right to inform the public on areas in which legislation may be had demeans the legislative function and interfers with the legitimate needs of Congress.

Senator Proxmire utilized the mechanisms established by Congress to inform his constituents and the general public of matters at the heart of Congressional business. Unlike *Doe,* there was no attempt to publish embarrassing details about private individuals, to "expose for the sake of exposure". Unlike *Gravel,* the means used to inform were not in contravention of criminal enactments of Congress. Involved is a simple attempt by a Member of the Senate to criticize what he considered to be misuse of public funds. As the court of appeals concluded (P. 78):

> If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this.

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[52] There is another, more elementary, reason that use of the public forum may become necessary. Simply, events may occur when Congress is not in session requiring Congressional statement. A notable example was the executive election to proceed with the B-1 bomber while Congress was in recess. Senator Proxmire was among

B. The inquiries of Federal agencies by Proxmire's office were within the investigative function of Congress and as such were legitimate legislative activity.

It is not challenged that the investigation and contacts by Senator Proxmire's legislative assistant, Morton Schwartz, with officials of federal agencies *prior* to the Senator's April 18, 1975 criticism of Petitioner's funding is legitimate legislative investigation, immune under the Speech or Debate Clause, *Watkins* v. *United States,* 354 U.S. 178 (1957); *McGrain* v. *Dougherty,* 273 U.S. 135 (1927). The Court of Appeals, however, relying on dicta in *Gravel* to the effect that attempts to influence agency officials are not immune, held that any follow-up investigation was not protected by the Speech or Debate Clause because Petitioner had alleged that these contacts "were made for the *purpose* of influencing the agencies, and not for the gathering of information" (emphasis added) (P. 74). In so ruling, the court below not only failed to recognize the impropriety of an inquiry into the "purpose" of otherwise legitimate investigation, but also, more importantly, failed to distinguish between efforts to influence executive action based on unlawful acts, from the legitimate pursuit of information which may, in purpose or effect, incidentally pressure or influence agency officials. In this respect, the lower court decision effectively eviscerates Congress' ability to monitor its actions without resort to formally subpoenaed testimony, and would stifle the attempts of individual members to prepare for hearings or develop new or corrective legislation.

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those critical of the decision (in a press release) without benefit of simultaneous comment in the halls of Congress. (Def. Exs. 107-110).

In *Watkins* v. *United States, supra,* 354 U.S. at 187, this Court stated that:

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad . . . . it comprehends probes into departments of the Federal Government *to expose corruption, inefficiency or waste.* (Emphasis added.)

In *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), the Court refused to question the *purpose* of such investigations, even where it was alleged that the "sole purpose" behind a subpoena was to "harass, chill, punish and deter" the exercise of First Amendment rights. Reaffirming the test for what constitutes legitimate legislative activity, the Court explained (*id.* at 504):

> The power to investigate . . . plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'.

So long as the inquiry "was intended to inform Congress in an area where legislation may be had", *id.* at 506, there could be no questioning as to motive, and there would be no balancing of its importance against the incidental effects on private rights.[53]

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[53] 421 U.S. at 508-509, and n. 16. The Court in footnote 16 rejected the invitation to consider an investigation's effects, ruling: "The speech or debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to 'grind to a halt' ".

Neither has it been suggested that the legitimacy of legislative investigation is less deserving of immunity when pursued by a member of Congress rather than by a Congressional committee, or the Congress as a whole. In *Gravel* v. *United States,* 408 U.S. 606, 624 (1972), the Court prohibited judicial review "except as it proves relevant to investigating possible third party crime, *concerning any act,* in itself not criminal, *by the Senator or his aides in the course of their employment, in preparation for the sub-committee hearing*". (Emphasis added.) Senator Gravel's acts of investigation and obtaining documents which the Court protected were not authorized by any committee, but were individual in nature.[54] The same view was expressed by the District of Columbia Court of Appeals in *McSurely* v. *McClellan,* 553 F.2d 1277, 1286-87 (D.C.Cir. 1977) (en banc), *cert. dismissed as improvidently granted,* 46 U.S.L.W. 4878 (June 26, 1978):

> We have no doubt that information gathering, whether by issuance of subpoena or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation. . . . "The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct

[54] The exception for inquiry into possible criminal activity is not a restriction on the legitimacy of the investigation itself, but rather a focus on the *means* by which it may be undertaken outside of Congress. Use of illegal means, or means that violate the Constitutional rights of private parties, may be unprotected by immunity although the concomitant investigation is legitimate, as use of such means is itself no part of the legislative process. *Gravel* v. *United States, supra,* 408 U.S. at 619-620. This issue is not present in the instant case since all acts of investigation conducted by the Senator's office were completely lawful, obtaining information available to the general public, and in no way implicating Constitutional rights.

> and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly".[55]

In contrast to these established principles of immunity for Congressional investigation, Justice White's remarks concerning Congressional contacts with executive officials to "cajole, and exhort with respect to the administration of a federal statute", *Gravel* v. *United States, supra,* 408 U.S. at 625, are rooted in *United States* v. *Johnson, supra,* which dealt with unlawful receipt of a bribe in return for a promise to make speeches or exert influence on the Justice Department. As *United States* v. *Brewster* makes clear, the judicial focus is on the unlawful and nonlegislative receipt of the bribe, rather than on the conduct promised in return.[56] To interpret the *Gravel* language to deprive of immunity *all* contacts with agency officials—even those made to gather information pursuant to Congressional investigation—is to completely shift the focus of inquiry from the non-legislative, criminal act (bribery) to an inquiry of the alleged purpose of indisputably legitimate legislative activity (investigation).[57] That

[55] Quoting, *Legislative Privilege,* 86 HARV. L. REV. 1113, 1154 (1973).

[56] 408 U.S. at 526.

[57] Petitioner's allegation that Schwartz's agency contacts were not made for the gathering of information is too flimsy a charge to withstand summary judgment. For example, the conversation Petitioner touts as showing Schwartz "angry" and "hostile" was a call made to NSF to check the status of that agency's funding of Hutchinson's work, and the "anger" was a result of Dr. Stollnitz of NSF refusing to supply the requested information. (A. 186). Whatever human emotions may also be involved, the existence of an attempt to gather pertinent information is surely present.

should not, and cannot, be done. Where, as here, the investigation is seeking information on a subject on which legislation could be had, an allegation of other purposes or effects must not be allowed to derail the Congressional activity.[58]

It is clearly beyond dispute that the investigation here is in an area on which legislation can be had. Continuous inquiry concerning the manner in which federal dollars are managed and spent is a necessary prerequisite to effective legislation for future appropriations, one of the primary duties of the Congress. The powers of Congress are derived from Article I, Section 8 of the Constitution, which provides in pertinent part:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States;
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing

[58] As was said in *Rusack* v. *Harsha,* Civ. No. 77-1137 (M.D.Pa. Dec. 14, 1978), in response to the allegation that a request for information also contained abusive and possibly defamatory language: "In some situations it may be that a primarily libelous letter which is only incidentally seeking information might not be protected under the Clause. But here the letter was the second one defendant Harsha had sent . . . in an attempt to gather information. The allegedly defamatory matter might well have been considered necessary by the Congressman in order to pinpoint the exact material he was after." Slip. Op. p. 19, n. 20. It cannot be expected that Congressional requests of information will always be sanitized of harsh language, brow-beating, or criticism. If the court adopts the role of dissecting Congressional investigation and bestowing immunity only upon the language the courts feel to have been minimally necessary in order to ferret out the facts, immunity for Congressional investigation will become more pretended than real.

> Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 9, further defines the Congressional powers and duties. It provides in part that:

> . . . No money shall be drawn from the Treasury, but in consequence of Appropriations made by law; and regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time. . . .

At the heart of the powers, and hence the business, of Congress, is control over the purse strings of Government. The nature and efficacy of government spending is certainly a "subject on which legislation may be had", *Eastland* v. *United States Servicemen's Fund, supra,* 421 U.S. at 508, and is thus an area in which Congress, and Congressmen, must be allowed to act. This is especially true here where, in addition to his general responsibilities, Senator Proxmire is a member of the Senate Appropriations Committee with particular authority over appropriations of all the federal funds at issue in this case.[59]

[59] The inquiries made by Senator Proxmire's Office here concern the expenditures of five government agencies: Office of Naval Research (ONR); National Science Foundation (NSF); National Aeronautic and Space Administration (NASA); National Institute of Mental Health (NIMH); and the National Institute of Drug Abuse (NIDA), each of which falls within the jurisdiction of an appropriations subcommittee upon which Senator Proxmire serves. These are the Subcommittees on Defense, Labor-HEW, and HUD-Independent Agencies. Proxmire is Chairman of the HUD-Independent Agency Subcommittee. More generally, he is also Chairman of the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee (A. 139-140; and Def. Exs. 7 and 8).

The inquiries and each of the expenditures mentioned in the Senator's statement and press release all involved appropriations for which Senator Proxmire had committee responsibility and upon which he actually voted. Disbursements by these agencies to Hutchinson were the specific subject of inquiry by the Senator at committee hearings.[60] The general type of expenditure and the problems it may present have been the subject of the Senator's inquiries of the same funding agencies at appropriation subcommittee hearings *both before and after* his "Fleece" criticizing the funding of Petitioner's work.[61]

Because the matter of appropriations is a continuous, year to year process, it is impossible to reconcile the Court of Appeals' determination, that oversight investigation after a certain point is not protected activity, with the true nature of the legislative function. Investigation of agency use of funds is always both oversight concerning the past year's appropriations and prospective information gathering for the present and future.[62] This is borne out by the instant case, where Senator Proxmire used the "follow up" investigation by his assistant Morton Schwartz to question NSF witnesses in commitee hearings regarding their continuous

[60] See, *e.g.*, A. 137.

[61] A. 144-145, 63-69, 130-138.

[62] The independent importance of the oversight function is underscored by the creation of the General Accounting Office, the principal function of which is to investigate and report to Congress on "all matters relating to the receipt, disbursement and application of public funds", 31 U.S.C. § 53. The GAO is further required to analyze agency expenditures "to enable Congress to determine whether public funds have been economically and efficiently administered." 31 U.S.C. § 60.

funding activities and the responsiveness of the agency peer review system to adequately determine priorities of use for appropriated funds.[63] This, in turn, would be of great relevance concerning his committee work and votes on the control of appropriations for the following year.

The investigation by Senator Proxmire and his staff concerned a subject at the very heart of Congressional powers and activity. The fact that those possessing the needed information in this instance were government officials rather than private citizens does not mean that the investigation is thereby non-legislative. If anything, contacts with official sources would seem the most legitimate of investigative procedures. Accordingly, the conduct of Senator Proxmire and his aide in investigating government spending through such contacts was within the Senator's legitimate legislative duties, immune from question of purpose or effect in any place.

II. Defendant's Actions Were Privileged Under the First Amendment

The existence of this case presents the issue whether a United States Senator, or any member of the public, may criticize the manner, merit, and justification of public spending without fear of prolonged litigation. Here Senator Proxmire is sued by a research scientist for publicly stating that the scientist's work does not merit government funding. The thrust of the extensive documentation supporting Dr. Hutchinson's claim, including scores of publications and affidavits of other scientists, is to show that the studies *do* have merit and

[63] A. 136-138.

deserve public support. Senator Proxmire is alleged to have spoken in knowing disregard of the truth by failing to acknowledge this "fact".

That the issue Petitioner asks this Court to decide is the merits and priorities of public spending is made abundantly clear by a comparison of the Senator's speech and press release with the press release issued in rebuttal by Hutchinson. The substance of the Senator's statement is that the identified studies are not worthwhile and funding by several federal agencies is wasteful. Dr. Hutchinson in his release stresses the general public need for studies of aggression and defends the agency care in approving them. In addition, he charges Proxmire with disservice to his constituents and the country (A. 83-85). These statements—as well as the rationale by each of the agencies on the merit of the studies—raise a genuine, indeed, a fundamental, issue of public concern and debate—how government spends its limited supply of money and what it gets for it. But, it does not raise an issue for a court.

Rather than being insulated from public scrutiny, Petitioner's solicitation and utilization of public funding deserve much greater public attention. Despite the importance of the tens of billions of dollars spent by the federal government on scientific research each year, Dr. Hutchinson presents an example where—prior to the Proxmire criticism—no federal agency was aware of the total amount of funds received by Hutchinson, the number and cost of projects pending, or the extent of rejections for similar projects by other agencies (Hutchinson Depo. pp. 178-179, 283-286). Only Proxmire attempted to discover total funding, and he was successful in viewing just the tip of the iceberg.

This Court is urged to keep the debate on public spending open, vigorous, robust, and unharnessed—not only in the halls of Congress, but before the public. Petitioner, through a staggering eight million dollar libel action, wants that debate stopped and restricted to the narrow group of interested specialists who parcel out the funds, or at a minimum kept in the abstract without focus on particular example or study. If his position is accepted, those who solicit and obtain funds collected from the public for purposes of their own will nonetheless be able to curtail public discussion by claiming that this is a private matter for which they take no risk of public view. No decision of this, or any other court, supports such a view.

To uphold the "profound national commitment . . . that debate on public issues be uninhibited, robust, and wide open", the Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964) interpreted the First Amendment to bar suit by public officials based on criticism of their conduct absent a showing of actual malice—that is, proof that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not (*id.* at 279-280).[64] The same reasoning was followed in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) where the privilege

[64] The applicability of the *New York Times* privilege to non-press defendants is unchallenged by Petitioner, and is assumed here. The *New York Times* opinion itself referred to both rights of speech and press, *supra,* 376 U.S. at 264, 265 and 268. Further, *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) has since stressed that the press as an institution "does not have a monopoly on either the First Amendment or the ability to enlighten," *id.* at 782, and that "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon its source . . ." *id.* at 777.

was extended to criticism of "public figures". Underlying the rulings in both cases was the Court's recognition of the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs", *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). And the Court has also noted that principal among those affairs is the distribution of public wealth, creating a strong public concern in knowing how "funds are utilized and put to work", *Wyman* v. *James,* 400 U.S. 309, 319 (1971).

In this case, Judge Leighton in the district court, after considering the "affidavits, exhibits, and excerpts from depositions", concluded that Dr. Hutchinson was both a public official and public figure. He further found an absence of evidence to establish "actual malice" (P. 52-53). The Seventh Circuit Court of Appeals considered and affirmed the determinations of public figure and absence of malice without reaching the public official issue (P. 82). All of these issues were considered below, were properly presented in Defendants' questions for review, and are discussed here.[65]

[65] Neither lower court accorded petitioner's privacy or other claims treatment separate from the discussion of privilege against the defamation claim, and none is offered here. Presumably, the nature of the privacy claim in the present case is one of the plaintiff being placed in a "false light", with the interest protected being "reputation", similar to a defamation action. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562 (1977). Petitioner concedes, as he must, that the privilege against these other claims must be no less than that available against defamation (Br. 33). See *Hotchner* v. *Costillo-Puche,* 551 F.2d 910, 913 (2d Cir.), *cert. den.,* 434 U.S. 834 (1977). It would be unthinkable to make the public's interest in open discussion dependent upon a plaintiff's selection of one or more overlapping actions under the common law.

A. Dr. Hutchinson was a public official

In *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), the Court examined alleged defamation of the supervisor of a publicly owned recreation area, and provided general guidelines for determining when an individual should be classified as a "public official" (*id.* at 85):

> Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Here, in reliance on the *Rosenblatt* standards, the district court found that the importance of Dr. Hutchinson't position as Director of Research at Kalamazoo State Hospital, the fact that he was dealt with as the responsible official by the federal agencies that funded his research, and that he purported to perform public works through his not-for-profit corporation, rendered him a person "in a position in government . . . [with] such apparent importance that the public has an independent interest in [his] qualifications and performance. . . ." (P. 53)

From 1968-1975, Dr. Hutchinson was employed by the Michigan Department of Mental Health as Director of Research, first at Fort Custer State Home (1968-1972), and then at Kalamazoo State Hospital.[66]

[66] "Vita" of Dr. Hutchinson, Def. Ex. 62. His public employment extends continuously back to 1959, with one brief interruption between 1960 and 1961. This employment includes Medical Research Associate at Anna State Hospital, 1959-60 and 1962-66; the

More than simply being in charge of the departments, however, he was the individual for whom the departments were created, the individual who selected and supervised the personnel working in the departments, and the individual responsible for obtaining and directing the use of both state and federal funding on projects selected by himself. (Hutchinson Depo. pp. 22-23, 26-28, 31.) When state administrators were reluctant to approve proposed work under a private Phillip Morris grant, Dr. Hutchinson established a private foundation with himself as president and proceeded to accept the grant and pursue that project using state facilities and research department personnel (A. 98). Although tacit authority over the department remained with other state officials, the state audit of the department found in fact that the absence of any mechanism for supervision resulted in ". . . the director of the Research department [Hutchinson] developing his program and functioning as an autonomous entity" (A. 97; see also Def. Ex. 76).

The scope and size of Hutchinson's operation has already been reviewed: approximately a million and a half dollars of federal and state funds obtained, another $4.7 million dollars in proposals, all conceived, initiated, operated and controlled by Hutchinson (A. 96, 306-309, 312). With fractionalized oversight divided among five federal agencies and two state departments, none of which apparently had a grasp of the

U.S. Public Health Service, 1961-62; Assistant Professor at Southern Illinois University, 1963-68; Associate Professor at Western Michigan University, 1966-73; Research Director, Fort Custer State Home, 1968-72; Director of Research, Kalamazoo State Hospital, 1972-1975. (*Ibid.*)

research department's activities, Hutchinson was virtually answerable to no one.

Petitioner was the prime mover in an operation that cost the public roughly a million and half dollars. It cannot seriously be urged that the public funds are received without a right of public review. Yet, if such review is to be meaningful, it cannot take place in a vacuum; it must of necessity involve where the money goes and for what. As the official responsible for making all of these determinations, Dr. Hutchinson was invested with a degree of influence such that the public had a legitimate interest in his qualifications and performance.[67]

It is certainly true that the "governmental affairs" over which Dr. Hutchinson exercised responsibility were not mainstream, political activities broadly felt across the breadth of state government. But they were, nevertheless, publicly supported undertakings of the state in an area of acute interest to many, and neither this Court nor the lower courts have thought it desirable to carve out areas of government where people of responsibility are freed from scrutiny. See *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971) (deputy chief of de-

[67] The close connection between control over public funds and "public official" status was echoed by Chief Judge William Nealon of the Middle District of Pennsylvania in *Rusack* v. *Harsha*, Civ. No. 77-1137 (M.D.Pa. Dec. 14, 1978), concluding that a naval contracting officer was a public official: "Assuming that plaintiff is not involved with the administration of the contracts, it is nevertheless evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be associated with any governmental employee. He is, therefore, a public official . . ." Slip Op. at 23, 24.

tectives for city police department); *Adey* v. *United Action for Animals,* 361 F.Supp. 457 (S.D. N.Y. 1973) *aff'd* 493 F.2d 1397 (2d Cir.), *cert. denied* 419 U.S. 842 (1974 (research scientist employed at NASA); *Gallman* v. *Carnes,* 254 Ark. 987, 497 S.W.2d 47 (1973) (university professor and assistant dean); *Bishop* v. *Wometco Enterprises, Inc.,* 235 So.2d 759 (Fla.App. 1970) (city investigator); *Ryan* v. *Dionne,* 28 Conn. Supp. 35, 248 A.2d 583 (1968) (city's delinquent tax collector); *Turley* v. *W.T.A.X., Inc.,* 94 Ill.App.2d 377, 236 N.E.2d 778 (1968) (professional architect and engineer designing city buildings) and *Silbowitz* v. *Lepper,* 55 Misc. 2d 443, 285 N.Y.S.2d 456 (Sup. Ct. 1967) (supervisor of branch post office). Because of the large degree of responsibility Dr. Hutchinson enjoyed over a not insubstantial area of government activity the district court was plainly correct in determining him to be a "public official" subject to the *New York Times* rule.[68]

B. Dr. Hutchinson was a public figure

Both lower courts considered and, on their own reviews of the record, concluded that Dr. Hutchinson was a "public figure" for purposes of discussing public funding of his work. The district court found (P. 52):

> Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities

[68] Determination of "public official" and "public figure" status is a question of law to be decided by the trial judge in the first instance, *New York Times Co.* v. *Sullivan, supra; Rosenblatt* v. *Baer,* 383 U.S. 75, 88 (1966).

> in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit.

The court of appeals reached the same conclusion (P. 80-81):

> Here, there is no question that Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications. (Defendants' Exhibits 82b, 83). The plaintiff had also published numerous articles regarding his work (Plaintiff's Exhibits 64-96), and stories regarding his research had appeared several times in local papers. (Defendants' Exhibits 47-51). In addition to his public status as to his research, it is evident from the record that plaintiff had sufficient access to the media to rebut any defamatory falsehood. Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39). Thus, Dr. Hutchinson had the appropriate status and access to the means of rebuttal to be considered a public figure with regard to the propriety of his research.

Both determinations were clearly correct applications of the law. In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), the Court drew a clear distinction between public and private figures for recovery for defamatory falsehood, and advised that public figure status must be resolved by reference to "the nature and extent of an individual's participation in the particular controversy in question", *id.* at 352. Where, as here, a plaintiff did not possess general fame or notoriety, the test is whether "an individual voluntarily injects himself or is drawn into a particular public controversy

and thereby becomes a public figure for a limited range of issues". *Id.* at 351. *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976) continued adherence to these principles, but instructed that not all matters of general public interest should be considered the sort of "public controversy" that justifies terming its participants "public figures".[69]

Both Petitioner and the American Psychological Association and American Association for the Advancement of Science as *amicus curiae* have launched a frontal attack on the protections afforded the First Amendment under these holdings by insisting that an individual's voluntary *participation* in a public controversy is insufficient to confer public figure status; rather, the only public figures are alleged to be those whose participatory role is one of *advocacy,* engaging the public attention to urge a yea or nay position on the controversy in question.[70] Thus, Dr. Hutchinson could not be a public figure simply because he solicited and obtained substantial government funds; it would also be necessary that he publicly advocate that his receipt of funds was good or bad. Such analysis completely strips the *Gertz* and *Firestone* opinions of their supporting rationale, and would *sub silentio* overrule the vast bulk of existing precedent in this area.

The principal justification for according public figures lesser protection against public discussion than is

[69] The *Firestone* language differed only slightly from *Gertz,* declining to find Mrs. Firestone a limited issue public figure because "she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it". 424 U.S. at 453.

[70] Petitioner's Br. p. 39; Br. of *amicus curiae* at p. 15.

enjoyed by private persons is that public figures "might be assumed to 'have voluntarily exposed [themselves] to increased risk of injury from defamatory falsehood.'" *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 456. It is true that assuming an advocacy role on the ultimate merits of a controversy is one manner of participation in the controversy that will invite attention and comment. But it is only one. Where public attention has voluntarily been invited by other actions, the logic of the *New York Times* rule equally applies, and the courts have so held.[71]

The public figure's participation in the controversy must, ordinarily, be voluntary. Here, because of Dr. Hutchinson's long and voluntary involvement with publicly funded research, his solicitation of millions of dollars in government grants, and the willing exposure of his work, both through his own writings and contacts with the press, the courts below properly found this element met.[72]

[71] Coach Butts did not attain public status by publicly debating his actions as a football coach; he did it by coaching football, *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). Similarly, Rosanova never sought to stimulate public discussion of his reputed gangland activities—but he nevertheless engaged upon a course of conduct bound to invite attention and comment in an area of legitimate public concern, and was thus properly considered a public figure. *Rosanova* v. *Playboy Enterprises, Inc.,* 580 F.2d 859 (5th Cir. 1978). See also the cases collected in Bamberger, *Public Figures and the Law of Libel, A Concept in Search of a Definition,* 33 BUS. LAW 709 (1978), where the author strongly rejects the "advocacy" definition suggested by Petitioner.

[72] Petitioner raises the novel argument that his solicitation of public funding was no more voluntary than Mrs. Firestone's resort to the judicial process, because—as a practical matter—he could not pursue his research without funding just as she could not terminate her marriage without instituting divorce proceedings.

The nature of the controversy—here, use of public funds—must also be scrutinized to determine whether it is properly a "public controversy" that warrants terming the participants in it "public figures", *Time, Inc.* v. *Firestone, supra.* To ask the question here is to answer it: there are few subjects more acutely of legitimate public concern than that of public expenditures. The merit of publicly funding the studies conducted by Petitioner is properly a subject of public discussion if the public is expected to pay for it.[73]

The nexus between public funding and public figure status is denied both by Petitioner and by *Amicus* APA, with the claim that this would adversely open to broad discussion virtually all civil servants, scholarship students, and welfare recipients.[74] But this exag-

(Br. 38) The analogy is entirely inappropriate. The state does force resort to the courts to resolve some matters of fundamental importance, and thus access is constitutionally protected, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), whereas access to the public coffers for private benefit is plainly not forced at all, *Wyman* v. *James, supra*, 400 U.S. at 324.

[73] Dr. Hutchinson characterizes his activity as simply "submitting confidential, grant applications" (Br. p. 35). While it is true that the *applications* are initially confidential, 45 C.F.R. § 612.9, Petitioner omits mention that this confidence is provided *only prior to an award*. Once the project is approved and funded by the government, it becomes a matter of open public record reported both to Congress and the general public. 45 C.F.R. § 612.8. Further, agency contracts themselves urge the widest practical and appropriate dissemination of research results, suggest contributions to various public journals, and often require extra copies of reports for greater availability.

[74] Petitioner's Br. p. 42; *Amicus* Br. p. 18. In support, Dr. Hutchinson seeks to minimize the amount of funding involved by discussing only those funds personally received *in his name*. (Br. p. 35). It is beyond dispute, however, that the bulk of the $1.5

and gloss of the nature of public expenditures does little to clarify the issue. Obviously, the individual funding of a single unique project is different than incidental receipt of a government pension check. In the latter case, the recipient is most often an indistinct member of an amorphous class, and there is little need to focus attention on the individual in order to discuss the merits of public spending in that area. In cases such as the present, however, decisions to spend millions of dollars are inextricably bound to questions of the qualifications and performance of the individual directing use of the funds. We do not maintain that any receipt of public funds confers "public figure" status. But civil servants and others drawing fixed stipends or performing established tasks cannot compare with an independent entrepreneur, individually seeking large amounts of government resources for projects initiated and controlled by himself.[75]

The courts below also properly considered other factors as contributing to the conclusion that Dr. Hutchin-

million in funding received was sought and obtained under the name of one or another institution whose research department was controlled and directed entirely by Dr. Hutchinson (p. 11, *supra*). These funds are no less at issue.

[75] *Amicus* also claims that using the solicitation of public funding as a criterion in determining public figure status will serve as a disincentive to those desiring public support, and that this chill of desirable activity was an evil recognized by *Gertz*. (*Amicus* Br. at 16). But *Gertz* was concerned with intimidation of lawyers by allowing wide-open discussion of affairs (political beliefs and actions) *unrelated* to their conduct in the cases they handled. Here, there is no such extraneous discussion. We further suggest that the APA's claim that research scientists will be chilled from seeking public support if the public is allowed to criticize this funding gives insufficient credit to the dedication and general integrity of the scientific community.

son was a public figure; namely, that through publication of numerous articles about his work and through interviews and contacts with the press, Dr. Hutchinson invited public recognition and attention to his work. While the bulk of his own publications might have little appeal to the general reading public, there is no contention that his work on aggression turned Hutchinson into a household name. But by publishing over forty articles and four books relating to his work (Pl. Exs. 46-96; Def. Ex. 62), many under public grants (A. 313-314) requiring public distribution,[76] Hutchinson put his work on public review and invited attention to his studies. Such public discussion and dissemination of ideas is, in fact, the very reason that the government makes research funds available. To publish under these accepted terms is to take the risk that the work will not be liked, or be thought to be worthless and a poor use of money.

The same is true of the news releases routinely given to the press about his work. Although the attendant publicity was not always given front page treatment, Hutchinson or his state agency were still actively seeking favorable publicity and inviting comment about the programs and studies concerning which he now seeks to foreclose comment.[77] And when front page treatment

[76] Congress established the National Technical Information Service (NTIS) to act as a clearinghouse making information generated under public contract available to the public, 15 U.S.C. § 1152. The stated purpose of the clearinghouse is to make such information widely available, 15 U.S.C. § 1151. It was from NTIS' weekly publication that Schwartz learned of Hutchinson's work.

[77] Hutchinson's newspaper exhibits and clippings drawn from papers of general circulation indicate the constant attempts made to draw attention to his work. The subjects of the articles include: announcement of study grant from NIMH, December 1, 1966 (Def. Ex. 47); announcement of NSF grant, November 1, 1968 (Def. Ex. 48); announcement of research grant from NASA, April 25, 1968 (Def. Ex. 49); announcement of new position as Director of Research, January 16, 1971 (Def. Ex. 50); announcement of publication of new book, May 18, 1973 (Def. Ex. 51); announcement of new grant from NSF, January 21, 1973 (Def. Ex. 52); announcement of publication, April 27, 1973 (Def. Ex. 54); and a front page, detailed interview conducted with Hutchinson, including photographs, December 8, 1974 (Def. Ex. 55).

was given in local papers to an interview discussing his research work and funding activities, Hutchinson did not hesitate to spread the publicity by having the article sent to funding agencies (Def. Ex. 78).

Moreover, Petitioner completely fails to address the widespread attention and publicity independently focused on his activities and use of public funds by the State Audit of his research department publicly released May 8, 1975.[78] That report centered almost entirely on Dr. Hutchinson's activities, and alleged among other things, improper management of the research department and misappropriation and mishandling of public funds and supplies (A. 97-108). Coverage of the audit's findings, as well as the state action in terminating the research department, was distributed by Associated Press and other news agencies and was widely reported.[79]

[78] The audit covered the years 1968-1974, and was completed prior to any public notice of Senator Proxmire's intention to criticize the funding of Hutchinson's work. (Hutchinson Depo. p. 98). A preliminary report had been circulated to state government officials the same day the Golden Fleece was announced (*id.* at 99-100), and was publicly released in final form some three weeks later.

[79] See Def. Exs. 56-61, 104-105, A. 109-128. To claim that the audit report only received widespread coverage because of the previous Golden Fleece award is disingenuous. The report's conclusions were extremely colorful, and presented the sort of "public exposé" that is not easily passed over by the press.

The audit report, and the publicity it engendered, occurred after Senator Proxmire's press release awarding the Golden Fleece, but before the mailing of any of the newsletters to constituents, or alleged appearances on radio and television programs. Certainly, with regard to all of these later actions, the public spotlight independently cast upon Dr. Hutchinson's research activities and use of public funds opened this area of his conduct to scrutiny as a "public figure".

The final explicit rationale offered by the lower courts as supportive of the conclusion that Hutchinson was a public figure was that his established contacts with the press gave him access and an opportunity to rebut the charges made by Senator Proxmire. *See Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 344. Dr. Hutchinon's release reached the wire services before expiration of the news embargo on the Proxmire release (until April 18 after 6:30 a.m., see P. 84), and his response is given prominent mention in the first coverage by AP, UPI, Times Wire Service, and the Washington Post (Pl. Exs. 32-39).[80]

In the limited area of publicly funded scientific research, an area admittedly of legitimate public concern, Dr. Hutchinson claims a position of pre-eminence by reason of the funds he has solicited, the articles he

[80] The APA as *amicus* claims that the Court has reduced the significance of the ability-to-rebut factor (Br. p. 20). The authority enlisted, however, is a dissent in *Time, Inc.* v. *Firestone, supra,* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344 n. 9, which in fact notes shortcomings of the self help remedy, but concludes, "But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry." The Court can hardly be said to have been more recently "de-emphasizing" this factor in the very case where it was first set out.

has written, and the publicity he has sought and obtained. For limited discussion of his publicly funded research, he *is* a public figure. And it is to this area alone that Senator Proxmire addressed his remarks. The lower courts, therefore did not err in finding the evidence produced conclusive of the fact that Ronald Hutchinson was a public figure, for the contexts of this case.[81]

C. Petitioner failed to present a genuine issue of malice

The rule of *New York Times* v. *Sullivan* imposes a Constitutional protection and prohibition against recovery by public officials or public figures for defamatory falsehood unless it can be established with "convincing clarity" that the statement was made with actual malice, that is "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The touchstone of malice in this specialized sense is knowledge; defendant must either have published with "a high degree of awareness of probable falsity", *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1967), or "in fact entertained serious doubts as to the truth

[81] That conclusion is amply supported by legal precedent finding such status in a broad variety of circumstances. Some examples are: *Adey* v. *United Action for Animals, Inc., supra* (a scientist involved in planning of a space flight for a monkey); *Edwards* v. *National Audobon Society,* 556 F.2d 113 (2d Cir.), *cert. den.* 434 U.S. 1002 (1977) (professors who had supported the use of pesticides); *Guitar* v. *Westinghouse Electric Corp.,* 396 F.Supp. 1042 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 309 (2d Cir. 1976) (author of book); *Vandenburg* v. *Newsweek, Inc.,* 441 F.2d 378 (5th Cir.), *cert. den.* 404 U.S. 864 (1971) (track coach) and *Lewis* v. *Reader's Digest Ass'n,* 366 F.Supp. 154 (D.Mont. 1973) (a health spa operator with a claimed arthritis cure). Petitioner falls within several of these categories, including professor or scientist, and published author.

of his publication," *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968).

Unless the evidence adduced during the summary judgment procedure demontrates that plaintiff could establish actual malice by clear and convincing proof, the court should grant ummary judgment for defendant lest the purpose of the *New York Times* privilege be defeated by prolonged litigation. *Fadell* v. *Minneapolis Star & Tribune Co., Inc.,* 557 F.2d 107 (7th Cir.), *cert. den.* 434 U.S. 966 (1977). "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate". *Washington Post* v. *Keogh,* 365 F.2d 965, 968 (D.C.Cir.), *cert. den.* 385 U.S. 1011 (1967).[82]

Here, Judge Leighton in the district court, following Dr. Hutchinson's charges of malice, granted summary judgment because he concluded that the charges were

[82] Accord, *Guitar* v. *Westinghouse Electric Co.,* 396 F.Supp. 1042 (S.D.N.Y. 1975) *aff'd* 538 F.2d 309 (2d Cir. 1977); *Pierce* v. *Capital Cities Communications, Inc.,* 576 F.2d 495 (3rd Cir.), *cert. den.,* 47 U.S.L.W. 3224 (1978). *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir. 1970); *Time, Inc.* v. *McLaney,* 406 F.2d 565 (5th Cir.), *cert. den.,* 395 U.S. 922 (1969); *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. den.,* 409 U.S. 1125 (1973). These cases do not derogate the jury's function as fact finder, but do properly insist that First Amendment interests not be sacrificed to unsupported allegations. Credibility of witnesses, when at issue, will remain a question for the jury, *Agosto* v. *Immigration and Naturalization Service,* 436 U.S. 748 (1978). But a plaintiff is not entitled to continue the litigation in the mere hope of putting defendant's credibility at issue without producing sufficient evidence establishing that defendant might, in fact, have entertained serious doubts concerning the truth of his statements. A defendant's purported awareness of the facts, while subjective, must nevertheless be supported by presentation of objective facts on which such awareness or knowledge could be premised, Fed. R.Civ.P. 56(e).

without foundation (P. 55-59). The court of appeals agreed, with the added observation that some of the statements challenged ". . . constitute a personal opinion as to the value of plaintiff's work, rather than false statements of fact and thus may not be defamatory in a Constitutional sense" (P. 82, n. 15). The lower courts' approval of summary judgment was proper, because the statements challenged were either statements of opinion or readily apparent use of colloquial expression, and because the record establishes that Defendants both exercised care in investigating, and discovered sufficient evidence during their investigation to justify their beliefs as to the accuracy of all factual statements made.

In urging that summary disposition of the malice issue was inappropriate because it involves Defendants' "motive, intent, and subjective feelings", Petitioner defines "malice" in a manner totally contrary to its legal meaning.[83] This Court has repeatedly explained that malice in the *New York Times* sense deals with awareness of falsehood, and in no way involves ill will, evil motives, or an intention to injure. *National Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264, 281 (1974); *Greenbelt Cooperative Publishing Ass'n* v. *Bressler,* 398 U.S. 6 (1970); and *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). Whatever the motives or intent of Senator Proxmire and his staff, summary judgment is

[83] Petitioner's Br. p. 44. Petitioner's misconception of the meaning of "actual malice" also colors his evidentiary presentation. While a supposed "bias" against other social scientists and an alleged "past pattern of malicious defamation" might be relevant to proof of some evil intent, it is of no relevance in judging possible awareness of falsity here.

still appropriate because they had no serious reason to doubt the veracity of their factual statements.[84]

If the Senator's and his aide's awareness of falsity is to be evaluated, those statements of fact where truth or falsity is involved must be separated from the expressions of subjective opinion and literary hyperbole where truth, or the awareness of it, cannot be judicially measured. Petitioner's predominant complaint is that Senator Proxmire berated his work as "nonsense", "so-called research", exhibiting "transparent worthlessness", in spite of the fact that its value had been defended by agency officials involved with its funding.[85] But a court cannot adjudicate, as Petitioner asks

[84] The authority offered by Petitioner to suggest that summary judgment should not be used when "malice" is claimed is indicative of the fallacy in the argument. The only Supreme Court authority presented, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), had nothing whatever to do with summary judgment on the "actual malice" issue, but rather advised that "summary procedures should be used sparingly in *complex antitrust litigation where motive and intent play leading roles . . .*" *id.* at 473 (emphasis added). While the Fifth Circuit did affirm a denial of summary judgment in *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378 (5th Cir.), *cert. den.*, 404 U.S. 864 (1971), the same court later upheld judgment n.o.v. granted by the trial court on the malice issue, *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975), and that Circuit has expressed its commitment to protecting First Amendment interests through use of summary procedures. See n. 82, *supra*. The lengthy quote from *Goldwater* v. *Ginzburg*, 261 F.Supp. 784 (S.D.N.Y. 1966) is of minor significance as that decision, on appeal, was replaced with a Second Circuit opinion which acknowledged the First Amendment interests in summary disposition, but simply concluded that it was not appropriate on the facts of that case. *Goldwater* v. *Ginzburg*, 414 F.2d 324, 337 n.21 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049 (1970).

[85] Petitioner's Br. 47-48. In any event, the denials of wasteful spending by officials concerned with a Senator's criticism would be insufficient to establish malice. "Surely liability under the 'clear

it to do, whether Respondents properly viewed the scientific merit of his work. The thread throughout Petitioner's argument is value, worth, merit—all subjective opinion beyond the scope of a justiciable issue.

Whether the Senator's expressions of opinion concerning Dr. Hutchinson's work is protected by the state's common law "fair comment" privilege,[86] or by the constitutional privilege deriving from *New York Times*, it is plain that the courts are not a proper forum in which to debate the "worth" of his research. As was said in *Gertz* v. *Robert Welch, Inc., supra* at 339-340; "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Similarly, using hyperbole or epithet in accusing one of "blackmail", *Greenbelt Cooperative Publishing Ass'n* v. *Bressler, supra,* or naming an individual as a "scab" who would sell "his birthright, country, his wife, and his children . . ." is non-actionable rhetoric rather than false statement of fact, at most a "lusty and imaginative expression of the contempt felt," *National Ass'n of Letter Carriers* v. *Austin,*

and convincing proof' standard of *New York Times Co.* v. *Sullivan* cannot be predicated on mere denials, however vehement. Such denials are . . . commonplace in the world of polemical charge and countercharge . . ." *Edwards* v. *Nat'l Audobon Society, supra,* 556 F.2d at 121.

[86] That privilege is applicable both in the Michigan and District of Columbia jurisdictions, *Nuyen* v. *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *Bostetter* v. *Kirsch*, 319 Mich. 547, 30 N.W.2d 276 (1948); *Fisher* v. *Washington Post Co.*, 212 A.2d 335 (D.C. App. 1965); *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C.App. 1977). *See also*, RESTATEMENT (SECOND) OF TORTS, § 566 (1977). It protects expressions of opinion on matter of public interest.

supra, 418 U.S. at 286. Quite simply, "An assertion that cannot be proved false cannot be held libellous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." *Hotcher* v. *Castillo-Puche,* 551 F.2d 910, 913 (2nd Cir.), *cert. den.* 434 U.S. 834 (1977). It at least seems clear that *New York Times* meant to foreclose evaluation of such opinions in the context of defamation suits.[87]

Once the world of opinion is separated from that of fact, it becomes clear that Respondent's investigation had produced ample evidentiary support for each and every of the purported factual misstatements attributed to them, and thus, as a matter of law, no actual malice can be shown.[88] It must be emphasized that many of the purported factual misstatements, such as the statement that Dr. Hutchinson's projects were "perhaps duplicative and that he was the recipient of

[87] In reference to criticism of an individual's published work, this principle was long ago expressed in *Carr* v. *Hood,* 1 Campb. 354, 357 (1808):

> We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure and even to ridicule, if their compositions be ridiculous; . . . Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him, but I cannot hear of malice on account of turning his works into ridicule.

[88] Petitioner has apparently abandoned the earlier position that malice could be demonstrated because of a failure to adequately investigate, adopting in his Brief p. 51, n.20 the district court finding that ". . . the Defendants spent many hours investigating and verifying their information." See also Petitioner's Br. p. 47 n.18. Failure to investigate, even if claimed, would not establish actual malice, *St. Amant* v. *Thompson,* 390 U.S. 727 (1968).

the funding, appear only in the initial release and newsletter, and are not repeated in the later newsletter, or radio and television appearances.[89] Petitioner's presentation of the "malice" issue, therefore, cannot apply to these other publications or statements.

It is alleged that malice might be demonstrated because Senator Proxmire termed Dr. Hutchinson's research projects for various agencies to be "perhaps duplicative" in spite of his staff's knowledge of the existence of a 1972 ONR memorandum finding no overlap between a certain two of Hutchinson's many projects.[90] This, of course, does not completely review Petitioner's work. Agency critiques of rejected applications obtained by the Senator's office contain statements about Dr. Hutchinson's on-going activities, and they *do* evidence concern about the similarity and duplication of Hutchinson's studies.[91]

One primary example of this is the explanation by the Experimental Psychology Research Review Committee in HEW of its rejection of one proposal. Among some complimentary remarks, the committee advised that its rejection was based in part on the conclusion that (Def. Ex. 90):

> Much of the proposed work was felt to consist of refinements on experiments already performed

[89] See A. 171. No record of the alleged radio appearances has ever been produced, and what, if any, defamatory remark may have been made by the Senator is unknown. A. 304-305.

[90] A. 72-73.

[91] Petitioner suggests that these critiques are meaningless as they were issued in connection with agency rejection of proposed projects. But the critiques clearly review Hutchinson's existing work under funded projects, and describe his actual operations.

and represented little more than an attempt to control for one or another loose end that remained in the earlier work.

* * *

Concern was also expressed because a considerable amount of the proposed work was already apparently being funded by other agencies.

The conclusion was "Considering the diversity of projects and these investigators' *already apparent tendency to overly fragment their work (especially Dr. Hutchinson)* it was felt that support was not warranted at this time." (emphasis added)

In 1974, HEW criticized another Hutchinson proposal, this concerning "Analysis of Noxious Stimulus Produced Alcohol Intake", commenting (A. 57):

> The bulk of the proposal contains studies which are preliminary, and could have been done earlier, especially since you have done *many similar studies* using other drugs. Thus, the basic paradigm should already be well established . . . (emphasis added)

When scientific reviewers complain of an "already apparent tendency to overly fragment their work" and "many similar studies", an expression that the work is "perhaps duplicative" cannot even approach the reckless disregard of truth required by *New York Times*. Even given the existence of other statements to the contrary, the adoption of one possible interpretation based on the documents from the several that could be made is not enough to create a jury issue of malice, *Time, Inc.* v. *Pape*, 401 U.S. 279, 290 (1971).

The second area of allegedly known factual misstatements concerns the statements that "all of this

money [the $500,000] was given to Hutchinson" and that Hutchinson had "made a fortune from his monkeys."[92] Attributing the funding directly to Hutchinson rather than listing the names of his various research institutions is—admittedly—an abbreviated style of identifying a grant recipient, but one that reasonably depicts the funding situation. The government grants all list Hutchinson as principal investigator, and place the funds under his control, supervision, and direction. When Hutchinson moved from location to location—Fort Custer, to Kalamazoo State Hospital, to the Foundation for Behavioral Research—the funds were transferred as well. Moreover, in speaking of other "principal investigators", Hutchinson casually speaks of them as being funded rather than fully identifying their universities or associations through which they received funding.[93]

To the extent that the "fortune from his monkeys" statement is anything more than hyperbole, it is a reasonable evaluation of the facts reviewed by the Senator's office. As explained both by Senator Proxmire and Morton Schwartz, this statement was a reflection of the fact that Hutchinson had been placed in a position of great status, income and power over substantial funding by virtue of his work with monkeys, earning a salary among the top percentage of incomes in the country.[94] The great discretion which Hutchinson was able to exercise over use of the money placed at his disposal is attested to by the state audit report.[95] While "for-

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[92] Petitioner's Br. 49.

[93] Hutchinson Depo., p. 208.

[94] A. 210, 226-227.

[95] A. 95-108.

tune" may mean different things to different people, it is not obviously inappropriate when applied to these circumstances.

The last challenged factual statements were those made by Mr. Schwartz during the course of his discussions with agency officials. Specifically, Petitioner alleges malice in Schwartz's "misrepresentation" of Hutchinson's approval rate at NIMH, as well as his purported statement that Hutchinson had been terminated for mismanagement of funds.[96] Again, there was strong evidence supporting these statements. While Hutchinson had assisted other principal investigators on NIMH-funded projects under a graduate fellowship, his own proposals were repeatedly withdrawn, or rejected by that agency. One project was eventually approved in 1974, but was not funded until after the "Fleece" in 1975, and thus did not appear in funding records supplied to Schwartz.[97]

The connection between Hutchinson's misuse of funds alleged in the state audit report and his subsequent termination was prominently declared by statements in the press, including such headlines as "Strange Expenses at Hospital Get Researcher Fired" [98] and "Bargain Days Cost State Researcher His Job".[99] Additionally, Hutchinson himself in his

[96] Petitioner's Br. 10, 14.

[97] This information was gathered by Schwartz by checking computer print outs of agency funding, and by checks with agency officials (A. 191-192). It was known that Petitioner had submitted several applications to NIMH (A. 310), and it was also known that prior to the Fleece, that agency had not funded any of Hutchinson's projects (A. 312).

[98] Detroit Free Press, May 9, 1975, A. 114.

[99] Detroit News, May 9, 1975, A. 115.

state Civil Service appeal has claimed that he *was fired* based on what might have been cause, not for the budgetary reasons put forth by the state.[100] Schwartz's relay of this information to NSF was certainly based on reasonable interpretation of the information available to him.

It is true that Senator Proxmire and his staff assistants presented a critical synopsis of Hutchinson's work, and did not give encyclopedic coverage to the full range of his studies. Dr. Hutchinson states that a proper presentation of criticism would take no less than an hour of oral presentation, and more to write.[101] If this "precision" standard were law, he would have successfully immunized himself from all but accolades. But the law neither recognizes this as desirable, nor insists that it be done. The record clearly supports the findings of the courts below that defendants were prudent in investigating the facts, and uncovered sufficient information to justify the beliefs expressed in their affidavits that all factual statements made by them were true.[102] The sum total of Petitioner's exposition of malice thus falls far short of that sufficient under *New York Times* to allow the case to go to a jury.

[100] Def. Ex. 111. The state litigation has still not concluded.

[101] A. 253.

[102] A. 145, 158.

CONCLUSION

For the foregoing reasons, Respondents William Proxmire and Morton Schwartz pray that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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